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IN THE

Supreme Court of the United States

October Term, 1984

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,
Petitioners,

— against —

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,
Respondent,

— and —

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

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BRIEF FOR PETITIONER CITICORP

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Questions Presented

1. Has Congress authorized confederations of states to create interstate banking regions through multi-state compacts that permit full service banking within the region by bank holding companies located in those states, but boycott the bank holding companies located in states outside the region?

2. Absent authorization by Congress, does such balkanization of interstate banking through regional compacts violate the Commerce Clause or the Compact Clause of the Constitution?

Parties to the Proceeding

The caption of the case in this Court lists all parties to the proceeding. The Rule 28.1 listing of petitioners' parent companies, subsidiaries and affiliates appears at Pet. App. A1-A20.

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BRIEF FOR PETITIONER CITICORP

Opinions Below

The opinion of the Court of Appeals is reported at 740 F.2d 203 and is reproduced at Pet. App. A21-A33. The judgment of the Court of Appeals is reproduced at J. App. A3-A4. The order of the Board of Governors of the Federal Reserve System (the "Board") approving the merger of Bank of New England Corporation ("BNE") and CBT Corporation ("CBT") is reported at 70 Fed. Res. Bull. 374 (1984) (Pet. App. A34-A71); the Board's order approv-

ing the acquisition by Hartford National Corporation ("HNC") of Arltru Bancorporation, Inc. ("Arltru") is reported at 70 Fed. Res. Bull. 353 (1984) (Pet. App. A72-A78); and the Board's order approving the acquisition by Bank of Boston Corporation ("BBC") of Colonial Bancorp, Inc. ("Colonial") is reported at 70 Fed. Res. Bull. 524 (1984) (Pet. App. A79-A86).

Jurisdiction

The judgment of the Court of Appeals was entered on August 1, 1984. The petition for a writ of certiorari was timely filed on September 6, 1984, and was granted on January 7, 1985. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

This case involves the Commerce Clause (Art. I, § 8, Cl. 3) and the Compact Clause (Art. I, § 10, Cl. 3) of the United States Constitution; 12 U.S.C. § 1842(d) (the "Douglas Amendment"); a Connecticut statute, 1983 Conn. Act 83-411 (Reg. Sess.); and a Massachusetts statute, Mass. Gen. Laws Ann. ch. 167A § 2 (West 1971 & Supp. 1984). These constitutional and statutory provisions are reproduced at Pet. App. A95-A102.

Statement of the Case

At issue in this case is the constitutionality of reciprocal Massachusetts and Connecticut statutes that form an interstate compact that permits local bank holding companies to offer full banking services throughout a multi-state region but precludes companies from other states from offering such services within the region. Petitioners contend that these laws, and the interstate compact of which they are a part, violate both the Commerce Clause and the Compact Clause of the Constitution, which forbid groups of states to join together to injure their sister states or impinge on federal authority without unmistakable Congressional authorization.

1. *Petitioners.* Petitioner Northeast Bancorp, Inc. ("Northeast") is a bank holding company organized under Connecticut law. Its wholly-owned subsidiary, petitioner Union Trust Company ("Union Trust"), is a Connecticut bank that competes directly with banks owned by respondents CBT, HNC and Colonial, among others. On August 3, 1983, Bank of New York Corporation, a New York bank holding company, agreed to acquire the stock of Northeast subject to Board approval and passage of enabling legislation by the State of Connecticut or the federal government.

Petitioner Citicorp is a bank holding company with its principal place of business in New York. Through its bank and non-bank subsidiaries, Citicorp offers a variety of financial services to consumers and businesses in New York, New England and elsewhere in the country (Pet. App. A224-A225). However, by virtue of the regional restriction provisions of the challenged statutes, Citicorp and other non-New England bank holding companies are barred from controlling a Connecticut or Massachusetts bank.

2. *The Bank Holding Company Act.* In 1956 Congress enacted the Bank Holding Company Act (the "BHCA"), 12 U.S.C. §§ 1841 *et seq.*, which provides, *inter alia*, that a bank holding company[1] may not acquire a bank[2] unless the transaction has been approved by the Federal Reserve Board pursuant to specified competitive, financial and other standards. *See* U.S.C. § 1842(a). Section 3(d) of the BHCA (the "Douglas Amendment") prohibits the Board from approving any acquisition of a bank located in one state by a bank holding company with its principal place of operations in another state, unless:

> "the acquisition . . . is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication."

---

1. A "bank holding company" is defined, for purposes of the BHCA, as a company that controls any bank or bank holding company. *See* 12 U.S.C. § 1841(a)(1).

2. In relevant part, 12 U.S.C. § 1841(c) defines a "bank" as an "institution . . . which (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans."

For sixteen years following passage of the Douglas Amendment, no state enacted a statute authorizing interstate bank acquisitions. Since 1972, several states have enacted such laws (Pet. App. A69-A70), but none of the legislation passed prior to December 1982 incorporated geographically discriminatory criteria.

3. *The New England Compact.* On December 30, 1982, Massachusetts enacted the nation's first regionally restrictive interstate banking statute (the "Massachusetts Act").[3] This law authorizes an out-of-state bank holding company to acquire control of a Massachusetts bank if:

1. the home state of the acquiring bank holding company grants reciprocal rights to Massachusetts bank holding companies (the "reciprocity provision"); and

2. the acquiring bank holding company has its principal place of business in Connecticut, Maine, Vermont, New Hampshire or Rhode Island and is not owned by a company with its principal place of business outside of those states or Massachusetts ("New England") (the "regional restriction provision").

According to its principal sponsor, State Senator John Brennan, the Massachusetts Act was specifically intended to exclude money center bank holding companies located in states such as New York, in order to give local companies "the space to grow" (Pet. App. A189). He explained that: "I just didn't think it would be good for the state if the big money center banks came in here" (Pet. App. A189). In summarizing a draft of the bill that eventually became the Massachusetts Act, the Research Staff of the Massachusetts House Committee on Banks and Banking noted that the purpose of the bill was:

> "to establish in the General Laws [of Massachusetts] the necessary authority for a regional, New England,

3. Mass. Gen. Laws Ann. ch. 167A, § 2 (West 1971 & Supp. 1984) (Pet. App. A101-A102).

banking system . . . [and] to ensure that only New England based financial institutions can avail themselves of this authority'' (Pet. App. A150).

To obtain reciprocal legislation in other New England states, Senator Brennan convoked a meeting of bankers, regulators, and legislators from the New England states in February 1983, and embarked upon a campaign to convince other New England states to ''join the Massachusetts plan and set up a real New England system'' (Pet. App. A189, A162-A168). The participants in this meeting then formed the New England Committee to Study and Promote Regional Interstate Banking, which included legislators from each of the New England states (Pet. App. A51, A161).

Senator Brennan also testified before the Connecticut Legislature that he strongly recommended ''adoption of a regional approach to interstate banking.'' He added that the bill which Connecticut ultimately enacted (the ''Connecticut Act'') bore a ''remarkable similarity to the Massachusetts [Act] . . . [and] would be a very very good companion to the Massachusetts concept'' (Pet. App. A154).[4]

Senator Brennan and his followers were successful in their efforts to obtain additional state regional banking statutes. On June 8, 1983, Connecticut enacted banking legislation with reciprocity and regional restriction provisions modeled on the Massachusetts Act.[5] The legislative history of the Connecticut Act manifests in even greater detail the same concerted, exclusionary purpose as that of the Massachusetts Act.[6] Connecticut legislators specifically referred to the ''New York banks'' and the

4. *See also* Conn. Sen. Debate at 70 (Sen. Sullivan) (Pet. App. A160); Conn. House Debate at 269 (Rep. Onorato) (Ct. App. JA833).

5. 1983 Conn. Act. 83-411 (Reg. Sess.) (Pet. App. A97-A100).

6. *See, e.g.*, Conn. Sen. Debate (Sen. Sullivan) (Pet. App. A159-A160); Conn. House Debate (Rep. Onorato) (Pet. App. A157-A158).

"fear that they would come into Connecticut." Those legislators sought to give "our banks in Connecticut" the chance "to merge and consolidate and purchase some of the New England banks" without competition from companies based in New York (Pet. App. A159-A160). On May 17, 1983, Rhode Island enacted similar reciprocal regionally restrictive legislation (the "Rhode Island Act").[7]

4. *The Spread Of State-Created Exclusionary Banking Regions.* The "New England Compact" formed by the Massachusetts, Connecticut and Rhode Island Acts is serving as the prototype for regionally restrictive interstate compacts that are spreading across the nation. As the Federal Reserve Board observed, "no fewer than 15 state legislatures are considering proposals that, if enacted, would create regional banking systems in every part of the country" (Pet. App. A37). In the map set forth on the following page, the Federal Reserve Bank of Boston graphically depicted these burgeoning banking zones—all of which exclude the principal boycotted money-center states, New York, Texas and California. This balkanizing process is proceeding apace: since the Board's March 1984 orders were issued, Florida, North Carolina, South Carolina and Utah all have enacted additional regionally restrictive banking statutes, and Georgia, Florida, North Carolina and South Carolina have established a Southeast banking region (Pet. App. A232, A244-A245).

Under these regionally restrictive banking statutes, bank holding companies from favored states would be able to consolidate and control full service banks on an interstate basis, thereby increasing their capital bases, attractiveness to customers and general competitive positions (Pet. App. A234-A237). In contrast, companies from disfavored states would be unable to provide full banking services anywhere within the exclusionary regions created by such statutes (Pet. App. A227).

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7. R.I. Pub. Law S. 0661 Sub. A (Pet. App. A103-A106). The regional restriction provision of the Rhode Island Act expires on July 1, 1986.

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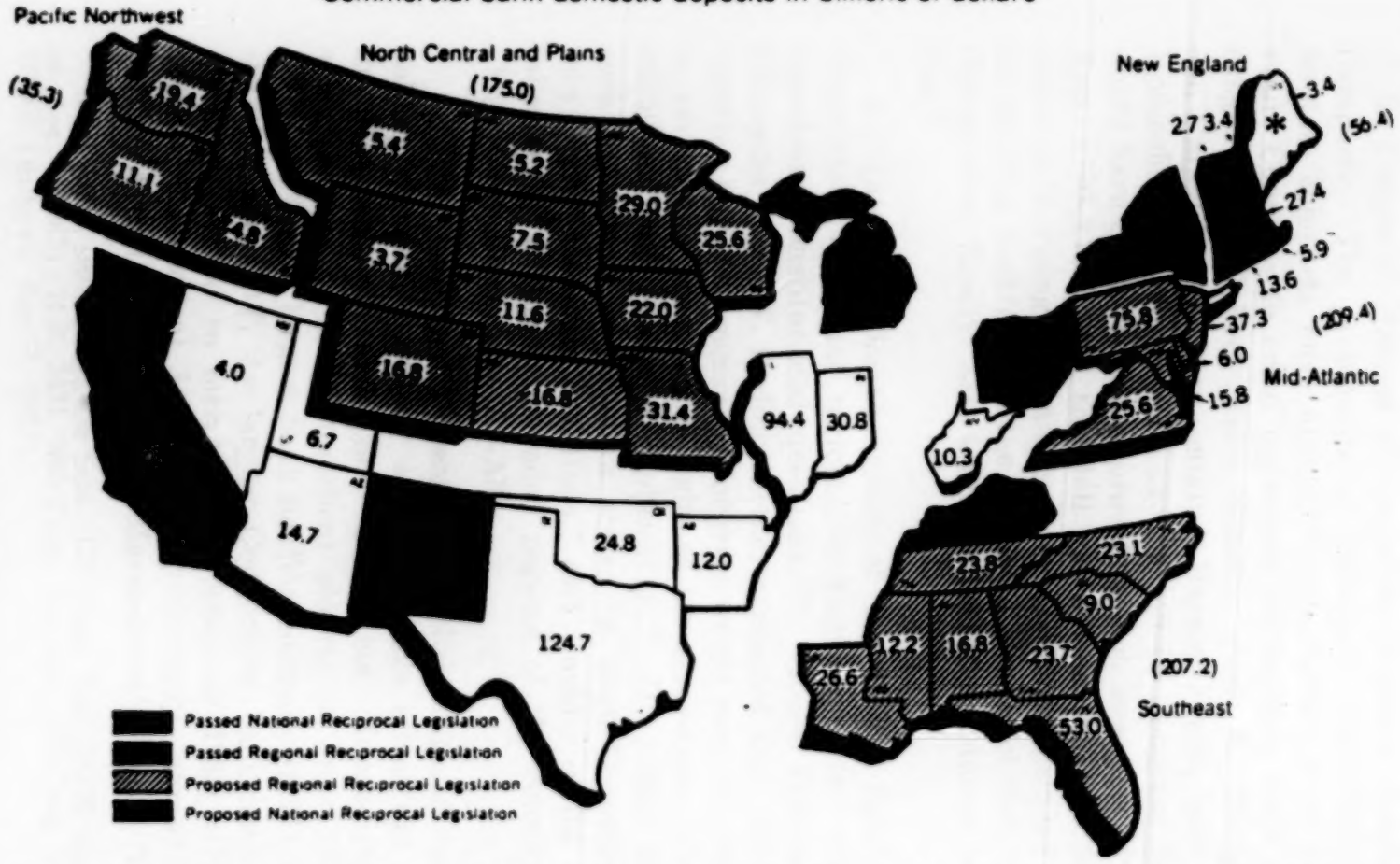
Proposed Interstate Banking Regions

Commercial bank domestic deposits in billions of dollars



*Maine passed a law in July 1975 allowing interstate banking with a reciprocal provision but that provision was rescinded on February 7, 1984.

Note: Alaska passed legislation in 1982 which allows interstate banking through holding companies on a national basis with no provisions for reciprocity. Georgia's legislature on February 13, 1984 passed a regional reciprocal interstate banking bill which is awaiting the governor's approval. Rhode Island's law provides for reciprocity in New England on July 1, 1984 and reciprocity in the nation to go into effect on July 1, 1986. This map only includes proposed interstate banking regions announced through mid-March 1984. Banking groups, state legislatures and other interested parties proposed these regions but they are not definitive. In fact, new ones are constantly being considered and proposed. Regional domestic deposits are shown in parentheses.

Source: Domestic deposit data as of June 30, 1983; Report of Condition Tape, FRS, FDIC, Comptroller of the Currency.

5. *Congress' Refusal To Approve Regional Banking Compacts.* The proponents of regionally restrictive interstate compacts have attempted unsuccessfully to persuade Congress to enact legislation authorizing their arrangements. United States Senator Paul E. Tsongas and United States Representative Barney Frank, both of Massachusetts, jointly sponsored a bill in Congress that would have given federal approval to such compacts (Pet. App. A190-A191),[8] but that bill was not enacted. A provision authorizing regional banking also was included in an omnibus banking bill, the proposed Financial Services Competitive Equity Act, which failed of enactment last year.[9]

At that time, the Chairman of the House Banking Committee noted that regional banking compacts "raise significant constitutional questions."[10] House Judiciary Chairman Peter W. Rodino further explained that, before enacting any such measure, Congress would need carefully to review the proposal, in light of its unresolved "Constitutional and economic implications." He added that such legislation would allow states to align themselves into "rival economic coalitions" and would "invite retaliation by States in excluded regions of the country" (Pet. Reply Brief App. A2-A3).

6. *The Challenged Transactions.* New England bank holding companies quickly sought to take advantage of the Massachusetts and Connecticut Acts. Immediately after passage of the Connecticut statute in June 1983, BNE, the fourth largest bank holding company in Massachusetts, and CBT, the largest Connecticut bank holding company, agreed to merge. In September 1983, HNC, another Connecticut bank holding company, agreed to acquire Arltru, the owner of a Massachusetts bank. And

8. S. 1002, 98th Cong., 1st Sess., 129 Cong. Rec. S4259 (daily ed. Apr. 7, 1983); H.R. 2431, 98th Cong., 1st Sess., 129 Cong. Rec. H1861 (daily ed. Apr. 7, 1983).

9. *See* S. 2851, 98th Cong., 2d Sess. § 903(2), 130 Cong. Rec. S11,178 (daily ed. Sept. 13, 1984).

10. 130 Cong. Rec. H10005 (daily ed. Sept. 24, 1984) (Rep. St Germain).

in November 1983, BBC, a Massachusetts bank holding company and the largest such company in New England, agreed to acquire Colonial, the owner of a Connecticut bank.

7. *The Decision Of The Federal Reserve Board.* In their applications to the Board for approval of their respective consolidations, BNE, CBT, HNC and BBC contended that the Connecticut and Massachusetts Acts authorized the Board to approve their transactions under the Douglas Amendment. As interested parties that would be directly injured by consummation of the proposed transactions,[11] petitioners contended that these statutes violate the Commerce Clause and the Compact Clause, and therefore cannot serve as an exception to the Douglas Amendment's general prohibition against interstate banking.[12] Thus, petitioners contended that the Board lacked authority to approve these consolidations.[13]

On March 26, 1984, the Board approved the BNE-CBT application. It conceded a lack of expertise concerning the constitutional issues rasied in this case, and stated that it would approve the challenged transaction unless it found the Connecticut statute to be "clear[ly] and unequivocal[ly]" unconstitutional (Pet. App. A41). Relying on a detailed staff analysis (Pet. App. A49-A71) that was "made a part of the Board's findings" (Pet. App. A41 n.15, the Board found that this stringent standard of

11. *See* 12 U.S.C. § 1850; Pet. App. A38 n.6; Pet. App. A233-A237.

12. Citicorp challenged each of these applications before the Board. Northeast and Union Trust challenged the BNE-CBT application. Since the Board's approval of the orders challenged in this case, the Board has approved five additional transactions, each of which has been challenged by Citicorp.

13. The Board may not approve an acquisition predicated on unconstitutional state legislation. *See Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965); *Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288, 1293 n.4 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975); Pet. App. A39-A40.

review had not been met, and therefore approved the transaction.

Nevertheless, the Board's specific findings directly support petitioners' contention that the Massachusetts and Connecticut Acts are unconstitutional. Noting that "[t]he discriminatory nature of [the Connecticut Act] is apparent from its legislative history" (Pet. App. A58), the Board found that the regionally restrictive Connecticut Act was enacted for purposes of economic protectionism (Pet. App. A57-A60). It also found that, absent Congressional authorization, "[the Connecticut Act] imposes a burden on interstate commerce of the type that would be found by the courts to violate the Commerce Clause." *Id.* The Board explained that this discrimination was suspect because these statutes are not the product of unilateral conduct, but instead constitute an interstate arrangement that "can be considered to be part of an implicit compact or agreement" (Pet. App. A51-A52).

Although the Board believed that the Douglas Amendment implicitly authorized the challenged state laws, it acknowledged that "the Douglas Amendment does not appear *on its face* to authorize discrimination by Connecticut in favor of its own residents and those of Massachusetts and other New England states . . . but against all other states" (emphasis in original). The Board also admitted that the "general" language of the Douglas Amendment "does not appear to meet the stringent test of explicitness laid down by the Supreme Court" in past Commerce Clause cases (Pet. App. A65). Finally, after reviewing the legislative history, the Board found "no discussion of the power to discriminate among potential out-of-state entrants" (Pet. App. A66).[14]

Given these findings, it is not surprising that the Board recognized that its tentative resolution of the "fundamental and unique constitutional issues" inherent in dis-

14. The Board subsequently approved the HNC-Arltru and BBC-Colonial acquisitions on the basis of the discussion in its BNE-CBT Order, applying the same analysis to the Massachusetts Act that it employed with regard to the Connecticut Act (Pet. App. A75, A84).

criminatory multi-state arrangements such as the New England Compact was "not free from doubt" (Pet. App. A41, A83). As Board Chairman Paul A. Volcker later advised Congress, the Board acted simply upon an "assumption of constitutionality" when it approved the applications (Pet. App. A197); and, according to Chairman Volcker, the Board perceives "serious questions both about the constitutionality of such arrangements and their implications for public policy" (Pet. App. A199).

8. *The Decision Of The Court of Appeals.* Petitioners filed petitions for review of the Board's orders pursuant to 12 U.S.C. § 1848,[15] and the Court of Appeals affirmed. Despite the Board's uncertainty about the issues in this case, the court accorded "substantial deference" to the Board's opinion, placing principal reliance on the Board's observation that the Douglas Amendment constitutes a "renunciation of federal interest in regulating the interstate acquisitions of banks by bank holding companies" (Pet. App. A29).

With regard to the Commerce Clause, the court asserted that because the Douglas Amendment imposes a federal ban on interstate bank acquisitions, "the Massachusetts and Connecticut statutes would appear to promote interstate commerce rather than restrict it" (Pet. App. A29). The Court also stated its belief that "by enacting the Douglas Amendment, Congress authorized Massachusetts and Connecticut to enact the statutes challenged here" (Pet. App. A31).

Concerning the Compact Clause, the court agreed with the Board's finding that these reciprocal statutes are part of an interstate compact, but held that the compact does not require consent from Congress because the court did

15. Citicorp filed a petition for review of each of the challenged Board orders. Northeast and Union Trust filed a petition for review of the Board's BNE-CBT order, and were granted the right to intervene in the appeal from the HNC-Arltru order (Pet. App. A94). The Second Circuit subsequently consolidated the BBC-Colonial appeal with the appeal from the other two orders.

"not think that a New England bank holding company system would in any way increase the political power of the New England states or encroach upon or interfere with the just supremacy of the United States. However, if at any time Congress should find any encroachment, it could remove the encroachment by appropriate legislation" (Pet. App. A32).

Summary of Argument

1. *The Douglas Amendment.* As both the Board and the Solicitor General have recognized, the Connecticut and Massachusetts Acts are unconstitutional in the absence of Congressional authorization (Pet. App. A52, A58; Board Br. in Opp. 5). They are openly protectionist statutes that form an interstate compact that intentionally discriminates against commerce from excluded states and impairs federal authority over interstate banking.

Because of the threat to the federal union posed by such discriminatory and divisive state laws, this Court has held similar laws unconstitutional unless their proponents can demonstrate that Congress—the forum in which representatives from all affected states can be heard—has specifically considered and approved the particular discrimination at issue. Consent may not be found under the Commerce Clause unless it is "unmistakably clear." *South-Central Timber Development, Inc.* v. *Wunnicke*, —— U.S. ——, 104 S. Ct. 2237, 2242 (1984). Likewise, a discriminatory multi-state compact cannot escape the prohibition of the Compact Clause absent an unmistakable manifestation of deliberate and specific Congressional approval of such an agreement.

Respondents attempt to meet their burden of proof by reference to the Douglas Amendment and to certain ambiguous language in the legislative history. However, respondents cannot even agree among themselves on where the purported authorization is to be found in the statute and its history. Their inability to agree on the source of the supposed authorization is a striking demonstration

of the absence of "unmistakable evidence" of Congressional consent.

As the Board explained, "the Douglas Amendment does not appear *on its face* to authorize discrimination" (Pet. App. A65) (emphasis in original). And, as the Solicitor General and the Board agreed, the "sparse legislative history" does not "address the question whether Congress intended to authorize the creation of regional banking arrangements" (Board Br. in Opp. 6; Pet. App. A66).

The language of the Douglas Amendment—which merely grants the states power to "permit expansion of banking across state lines where it would otherwise be federally prohibited" (*Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980))—cannot be viewed as expressing advance approval by Congress of the serious form of discrimination at issue here. The literal language of the statute does not refer to or approve any of the many forms of laws that individual states might enact in this field, and even more clearly does not mention concerted state action of any kind. And there is not the slightest indication that Congress meant to waive the traditional protections of the Constitution. Congress' general deference to state law in the Douglas Amendment does not establish such a waiver, since the "negative implications of the Commerce Clause . . . are ingredients of the *valid* state law to which Congress has deferred." *Sporhase* v. *Nebraska*, 458 U.S. 941, 959-60 (1982) (emphasis in original).

It is also unavailing to argue in this case that the Douglas Amendment constitutes a "renunciation" of all federal interest in the subject of interstate bank acquisitions. Far from renouncing a federal interest in this intensely regulated field, the Douglas Amendment affirmatively articulates federal policy. Moreover, any suggestion that in 1956 Congress abandoned all interest in the field and implicitly authorized states to form confederations to boycott sister states—without even a word of discussion on that subject—flies in the face of the history of the BHCA and the principle of equality among the states upon which the Constitution is based.

There can be no mistake about the practical implications of the Court of Appeals' misconstruction of the Douglas Amendment. The court has arrogated Congress' policy-making function on one of the most intensely-debated issues to come before Congress in recent years. Neither the New England states nor a federal court should make the decision whether the nation is to be partitioned into regional banking zones. This is a question of profound importance to the entire country, and the decision is wisely vested by the Constitution in the national legislature. The Court of Appeals' creation of "consent" by judicial implication undermines Congress' ability to prescribe public policy in this area, and effectively precludes representatives of burdened states—such as the State of New York—from participating in a "collective decision" on the wisdom of regional banking. *Wunnicke,* 104 S. Ct. at 2243.

2. *The Commerce Clause.* Absent Congressional authorization, the regionally discriminatory Massachusetts and Connecticut statutes clearly violate the Commerce Clause. As the Board found, the purpose and effect of these statutes is to discriminate against the commerce of excluded states in order to favor the commercial interests of local banking institutions (Pet. App. A58). Such openly protectionist and overtly discriminatory legislation is subject to a "per se" rule of unconstitutionality. *Philadelphia* v. *New Jersey,* 437 U.S. 617, 624 (1978).

Moreover, even under the more lenient "balancing test," which is reserved for legislation that promotes a legitimate state interest in an even-handed manner, the Connecticut and Massachusetts Acts are unconstitutional. As this Court recently declared in *Lewis,* 447 U.S. at 42-44, any asserted state interest in regulating local financial practices, discouraging undue economic concentration, and preserving local control over financial activities, does not justify discrimination among out-of-state bank holding companies on a naked geographical basis.

3. *The Compact Clause.* The Compact Clause prohibits any compact or agreement between two or more

states that has not been approved by Congress if it tends to impair the interests of sister states or increases the power of the compacting states at the expense of federal authority. *United States Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452, 471, 477 (1978). This Court's decisions establish that the Compact Clause plays a critical protective role where, as here, a multi-state agreement threatens injury to the welfare of excluded states: "This provision is obviously intended to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States, which might affect injuriously the interests of the others." *Florida* v. *Georgia,* 58 U.S. (17 How.) 478, 494 (1855).

As the Board found, both by their very nature as reciprocal statutes and as the result of collaborative actions among representatives of the New England states, the Connecticut and Massachusetts Acts, along with the Rhode Island Act, constitute a compact designed to "create a [New England] regional banking zone" that precludes non-New England companies from controlling banks within the region (Pet. App. A51).

The New England Compact fosters the very kind of divisive regionalism and interference with the federal union that the Compact Clause was designed to avert. Because of its "discriminatory nature" (Pet. App. A58), the New England Compact inflicts substantial injury on all excluded states—particularly "money center" states such as New York, which are the principal targets of the boycott. In addition, by vesting in a confederation of states potentially inconsistent authority over interstate banking, a matter of intense national concern, the New England Compact impermissibly disrupts the balance of power between the states and the federal government.

As the Board noted, Congress has never consented to the New England Compact (Pet. App. A52), despite frequent efforts by proponents of regional banking to obtain the requisite consent in recent sessions of Congress. As a result, the New England Compact plainly violates the Compact Clause.

ARGUMENT

I. The Douglas Amendment Does Not Authorize The Connecticut And Massachusetts Acts

As the Board recognized, "[a]bsent congressional authorization of [the regionally restrictive state laws] in the Douglas Amendment, it appears that [they] would be inconsistent with the standards for state action under the Commerce Clause as established by the Supreme Court" (Pet. App. A55). The Solicitor General has agreed that "[i]n the absence of congressional authorization, there is little doubt that state restrictions on interstate banking such as the ones in this case would run afoul of the Commerce Clause" (Board Br. in Opp. 5). Thus, the government has recognized that the pivotal issue in this case is whether, in the Douglas Amendment, Congress has authorized a group of states to act in concert to form a regional banking zone that boycotts bank holding companies located in excluded states.

Such authorization would depart drastically from the principles upon which our common market economy is based. Therefore, as this Court's decisions make plain, Congressional authorization cannot be inferred. Those contending that Congress has authorized such discriminatory conduct bear a heavy burden of proof that Congress deliberately and specifically intended to approve such a boycott by a group of states against other states.

As the Board found, neither the literal language of the Douglas Amendment nor its legislative history manifests consideration by Congress in 1956 of the types of interstate banking statutes an individual state might enact, much less any Congressional purpose to allow concerted discrimination by groups of states against their sister states (Pet. App. A65-A66). Allowing the courts to imply consent under such circumstances would improperly deprive Congress—the forum in which all states

may be heard—of its Constitutional function of considering and protecting the interests of all the states and of the federal government.

A. The Need For Deliberate and Specific Congressional Authorization

As this Court noted in *H.P. Hood & Sons, Inc.* v. *Du Mond,* 336 U.S. 525, 533 (1949), the Constitution was adopted for the purpose of eliminating regional discrimination destructive of the harmony of the Union. The Court explained that prior to the adoption of the Constitution:

> "'. . . each State would legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view.' This came 'to threaten at once the peace and safety of the Union.' Story, *The Constitution,* §§ 259, 260. See Fiske, *The Critical Period of American History,* 144; Warren, *The Making of the Constitution,* 567."

To control these dangers, and to avoid the prospect of states retaliating against each other, the Framers of the Constitution entrusted regulation of interstate commerce to the federal government. *See South-Central Timber Development, Inc.* v. *Wunnicke,* —— U.S. ——, 104 S. Ct. 2237, 2243 (1984). The Commerce Clause rested on "the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation." *Hughes* v. *Oklahoma,* 441 U.S. 322, 325-26 (1979). This Court's decisions construing the Commerce Clause have declared that "[t]he United States could not exist as a nation if each of them were to have the power to forbid imports from another state . . . or to discriminate as between neighboring states in admitting articles produced therein." *Milk Control Board* v. *Eisenberg Farm Products,* 306 U.S. 346, 351 (1939).

The Framers were not concerned solely with the dangers posed by discriminatory actions by individual states. They also were acutely aware of the even greater danger to the Union posed by groups of states acting through compacts and combinations to oppress excluded states. The debates at the Constitutional Convention vehemently denounced "partial confederations" and regional "combinations" of states aimed at restricting the commerce of other states. *See, e.g.*, J. Madison, *Debates in the Federal Convention of 1787, reprinted in Documents Illustrative of the Formation of the Union of the American States*, H. Doc. No. 398, 69th Cong., 1st Sess. 584-87 (1927) ("[i]t seems to be feared that the Northern States will oppress the trade of the South. . . . The middle States may apprehend . . . combinations [against] them between the Eastern & Southern States"); *id.* at 633-38 ("different interests" of the North, South, East, and West would lead to "oppressive regulations" of commerce); *see also id.* at 239-40, 245, 292, 298-99, 302, 304, 315, 374, 382. *The Federalist Papers* also condemned such partial confederacies of states as destructive of the fabric of the Union:

> "Each . . . separate confederacy . . . would pursue a system of commercial policy peculiar to itself. This would occasion distinctions, preferences, and exclusions, which would beget discontent." *Federalist Paper* No. 7 at 62-63 (Rossiter ed. 1961).

See also id. No. 8, at 66. Accordingly, the Founding Fathers required that interstate compacts that potentially injure other states or the Union at large be approved by Congress, the forum in which all states are represented and have a voice. *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978).

In view of the importance of the interests at stake, this Court consistently has imposed a heavy burden upon those who contend that Congress has consented to state action that otherwise would violate the Commerce or Compact Clauses. Respondents here are unable to carry that burden.

B. The Douglas Amendment Does Not Provide The Requisite Congressional Authorization

Although they contend that the Douglas Amendment authorizes states to join together to discriminate against out-of-state bank holding companies from other states, respondents cannot agree on where such authorization is to be found. The intervenor-respondents argue that the legislative history provides the required authorization (CBT Br. in Opp. 11-14). The Solicitor General disputes that contention, noting that the "sparse legislative history" does not "address the question whether Congress intended to authorize the creation of regional banking arrangements" (Board Br. in Opp. 6).

Instead, the Solicitor General has suggested that authorization for the discriminatory statutes might be found in the "literal terms" of the Douglas Amendment (Board Br. in Opp. 5). This position, in turn, conflicts with the Federal Reserve Board's findings that "the Douglas Amendment does not appear *on its face* to authorize discrimination by Connecticut in favor of its own residents and those of Massachusetts and other New England states . . ., but against all other states," and that Congress has not approved the New England Compact (Pet. App. A65, A52; emphasis in original).

Respondents' inability to agree on the source of the purported authorization is convincing evidence that they cannot meet their burden under the Commerce and Compact Clauses to demonstrate deliberate and specific Congressional authorization for these concerted, discriminatory state statutes.

1. *The Commerce Clause*

To satisfy the requirements of the Commerce Clause, proponents of discriminatory state laws must demonstrate that Congress has deliberately and specifically authorized the particular deviation from the constitutional mandate of non-discrimination—*i.e.*, has made "unmistakably clear"

its intent to authorize states to discriminate against interstate commerce in the particular manner established by the challenged state law. *Wunnicke,* 104 S. Ct. at 2242.

In its decision last Term in *Wunnicke,* this Court emphasized the need for a showing of specific Congressional consent and refused to imply consent for discriminatory state laws even from parallel or "consistent" policies in federal legislation:

> "The requirement that Congress affirmatively contemplate otherwise invalid state legislation is mandated by the policies underlying dormant Commerce Clause doctrine. . . . Unrepresented interests will often bear the brunt of regulations imposed by one State having a significant effect on persons or operations in other States. . . . [W]hen Congress acts, all segments of the country are represented and there is significantly less danger that one State will be in a position to exploit others. Furthermore, if a State is in such a position, the decision to allow it is a collective one. A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision and reduces significantly the risk that unrepresented interests will be adversely affected by restraints on commerce." *Id.* at 2242-43.

The Court emphasized the same requirement of unmistakable approval in *Sporhase* v. *Nebraska,* 458 U.S. 941 (1982), where proponents of a discriminatory state water law asked this Court to find Congressional authorization for the law from 37 federal statutes and a number of Congressionally approved interstate compacts that demonstrated federal deference to state water laws and required "the Secretary of the Interior, in carrying out the provisions of this Act, [to] proceed in conformity with such [state] laws." *Id.* at 959. The Court flatly rejected the contention that this federal deference to and reliance upon state law constituted approval of the discriminatory state enactment:

> "Neither the fact that Congress has chosen not to create a federal water law to govern water rights in-

> volved in federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce. In the instances in which we have found such consent, Congress' ' 'intent and policy' to sustain state legislation from attack under the Commerce Clause' was 'expressly stated.' " *Id.* at 960 (footnote omitted).

This Court emphasized that Congressional approval of discriminatory state laws cannot be inferred from federal deference to or incorporation of state law standards, because the requirements of the Commerce Clause "are ingredients of the *valid* state law to which Congress has deferred." *Id.* (emphasis in original).

Similarly, in *New England Power Co.* v. *New Hampshire,* 455 U.S. 331, 343 (1982), the Court rejected the claim that state regulations inconsistent with the Commerce Clause were authorized by a provision in the Federal Power Act, reasoning:

> "[W]hen Congress has not 'expressly stated its intent and policy' to sustain state legislation from attack under the Commerce Clause, *Prudential Ins. Co.* v. *Benjamin,* 328 U.S. 408, 427, 431 (1946), we have no authority to rewrite its legislation based on mere speculation as to what Congress 'probably had in mind.' "

Neither the language of the Douglas Amendment nor its legislative history contains the unmistakable authorization this Court requires to enable states to join together to impose discriminatory burdens on the commerce of sister states.

a. The Language Of The Douglas Amendment

The Douglas Amendment states, in relevant part, that the Federal Reserve Board may not approve the acquisition of a bank located in one state by a bank holding company

with its principal place of operation in any other state, unless:

> "the acquisition . . . is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." 12 U.S.C. § 1842(d).

This language says nothing about the validity of any of the many types of laws a state might adopt in this field. And it says nothing about discrimination by a single state, much less by a group of states, against other sister states. While Congress obviously recognized that some states might individually enact laws permitting interstate banking in the future, the language of the Douglas Amendment nowhere states, or even implies, that such state laws would be immune from the Commerce Clause. Nor, of course, does it discuss the possibility of exclusionary interstate compacts.

In marked contrast, when Congress wishes to approve a state-imposed burden on interstate commerce or an interstate compact, it does so in terms that are unambiguous and that put Congressional representatives from every state on notice of the purpose of the federal action. *See, e.g.*, McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015; Low-Level Radioactive Waste Act, 42 U.S.C. §§ 2021(b)-2021(d).

The foregoing analysis of the literal language of the Douglas Amendment finds direct support in *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980), which establishes that the Douglas Amendment does not authorize discriminatory state legislation:

> "[I]t is doubtful that § 3(d) [the Douglas Amendment] authorizes state restrictions of any nature on bank holding company activities. The language of the statute establishes a general federal prohibition on the acquisition or expansion of banking subsidiaries across state lines. The only authority granted to the States is the authority to create exceptions to

this general prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited'' (emphasis in original; footnote omitted).

In *Lewis*, the state of Florida contended that its law prohibiting out-of-state bank holding companies from acquiring local investment subsidiaries was authorized by the Douglas Amendment and § 7 of the BHCA, a broadly phrased provision that saved state laws and regulations from federal preemption. This Court held that while ''[i]n contrast to [the Douglas Amendment], § 7 of the Act does reserve to the States a general power to enact regulations applicable to bank holding companies,'' there is ''nothing in its language or legislative history to support the contention that it also was intended to extend to the States new powers to regulate banking that they would not have possessed absent the federal legislation.'' *Id.* at 48-49. To the contrary, the Court found that ''[f]ar from creating a new state power to discriminate between foreign and local bank holding companies, the legislative history evinces an intent to forestall such a broad interpretation.'' *Id.* at 49. Thus, § 7 was designed to countenance ''*only . . . state legislation that operates within the boundaries marked by our Commerce Clause.*'' *Id.* (emphasis added). Since § 7 of the BHCA does not have the effect of waiving the protection of the Commerce Clause, it follows *a fortiori* that the Douglas Amendment —which was enacted at the same time as § 7, and which speaks to the Board and not to the states—has no such extraordinary effect.

Thus, the literal language of the Douglas Amendment can in no way be read as containing the necessary authorization for even an individual state to discriminate among out-of-state bank holding companies in a manner that otherwise would violate the Commerce Clause. Moreover, since the Douglas Amendment speaks simply of a single host ''State,'' it is even more apparent that the Douglas Amendment says nothing about groups of states

joining together to discriminate against commerce deriving from disfavored sister states.

Nor is it tenable to argue that the ability of a state under the Douglas Amendment to lift the federal prohibition on interstate acquisitions provides implicit Congressional authorization for states to engage in concerted, discriminatory activities. This argument is simply an invitation to engage in the type of "speculation as to what Congress 'probably had in mind'" that was condemned by this Court in *New England Power Co.*, 455 U.S. at 343. Congressional approval of discriminatory state laws cannot be inferred merely because Congress contemplates the enactment of state laws in a particular field and defers to those laws. The limited power of states under the Douglas Amendment to enact laws "to permit expansion of banking across state lines where it otherwise would be federally prohibited" (*Lewis*, 447 U.S. at 47) simply does:

> "not indicate that Congress wished to remove federal constitutional constraints on such state laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid* state law to which Congress has deferred."

Sporhase, 458 U.S. at 959-60 (emphasis in original).

b. The Legislative History Of The Douglas Amendment

Like the plain language of the statute, the legislative history of the Douglas Amendment provides no indication that Congress intended to allow the states to join together to discriminate among sister states or to balkanize the banking system by adopting exclusionary trade zones. As the Board expressly recognized, "[t]he Douglas Amendment was proposed during the debate on the Senate floor and there is no committee report or other significant legislative history to clarify its meaning" (Pet. App. A66).

In enacting the BHCA, Congress was concerned with effecting a federal ban on the expansion of bank holding

companies across state lines, and not with any state action that might be taken to lift the federal proscription. *Id.* In fact, Congress was of the view that, although the states were empowered to allow such expansion to occur in the future, no state would choose to do so.[16] Consequently, the manner in which a state—and, *a fortiori*, a group of states—might elect to permit interstate banking was never even considered.

It is not surprising, therefore, that there is no indication in the legislative history that Congress intended to authorize discriminatory state legislation. As the D.C. Circuit stated in *Iowa Independent Bankers* v. *Board of Governors*, 511 F.2d 1288, 1296 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975), "[n]ot once in the entire debate is the . . . question raised." Similarly, the Board found that there was "no discussion [in Congress] of the power of the states to discriminate among potential out-of-state entrants" (Pet. App. A66).

Indeed, the legislative history of the Bank Holding Company Act shows that the Douglas Amendment was directed against the very notion of regional interstate banking that the Connecticut and Massachusetts Acts, and the New England Compact, seek to establish. At the time Congress was considering the BHCA, certain bank holding companies were becoming increasingly powerful in particular regions of the country. The expansion of these regional companies was a principal concern of Congress, and one of the purposes of the Douglas Amendment was spe-

16. Representative Spence, the sponsor of the House bill, told Congress that he found no material difference between the BHCA, as amended by Senator Douglas, and the original House proposal, which would have totally prohibited interstate bank acquisitions. 102 Cong. Rec. 7165 (1956) (Pet. App. A118). During the Senate debate, Senator Bricker stated that "in effect, [the Douglas Amendment] constitutes an absolute prohibition against future expansion by bank holding companies." *Id.* at 6861 (Pet. App. A112-A113). *Accord id.* at 6934 (Sen. Capehart) ("under the proposed legislation we are pretty much freezing the banking system of America") (Pet. App. A117); *id.* at 6860 (Sen. Douglas) (Pet. App. A111-A112).

cifically to prevent such regional banking.[17] Moreover, the legislative history shows that Congress, in enacting the BHCA, fully intended to preserve the traditional equality of the states and to avoid regional discrimination.[18]

Thus, respondents are unable to demonstrate that the Douglas Amendment provides the affirmative and considered Congressional authorization necessary for a state to act in contravention of the principles of free domestic trade and federalism embodied in the Commerce Clause. And they are *a fortiori* unable to show that Congress intended to allow a group of states to join together in a regional confederation designed to inflict such discrimination. As testimony before Senator Douglas' committee emphasized, the proposed bank holding company legislation "maintain[ed] the autonomy of the *separate* states."[19]

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17. *See Control and Regulation of Bank Holding Companies: Hearings on H.R. 1674 Before the House Committee on Banking and Currency*, 84th Cong., 1st Sess. 22-83 (1955) (Ct. App. JA1967-1998); *Hearings on S. 76 and S. 1118 Before the Senate Committee on Banking and Currency*, 83rd Cong., 1st Sess. 289 (1953) (Ct. App. JA1999). *See also* 102 Cong. Rec. 6858 (1956) (Ct. App. JA2000). As a later Congress stated in amending the BHCA, the purpose of that statute was to deal with the problem of "the unrestricted ability of such a company to obtain banking units, thereby concentrating the commercial bank facilities *in a particular area* under a single control." S. Rep. No. 91-1984, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 *U.S. Code Cong. & Ad. News* 5519, 5520 (emphasis supplied) (Ct. App. JA2002).

18. *See* H.R. Rep. No. 609, 84th Cong., 1st Sess. 2-3 (1955) (Ct. App. JA1942). The legislative history of the BHCA is replete with references to Congress' desire to assure that the statute was nondiscriminatory and did not favor any particular state or region. *See, e.g.*, 101 Cong. Rec. 8180-81 (1955) (Rep. Keating) ("It strikes me that if we are going to enact a bill, which I think we need, we should enact one that applies throughout the Nation and equally to all institutions") (Pet. App. A107); *id.* (Rep. Brown) (Pet. App. A108-A109); *id.* at 8184 (Rep. Smith) (Pet. App. A110-A111); 102 Cong. Rec. at 6861 (1956) (Sen. Bricker) (Ct. App. JA674).

19. Hearings on S. 76 and S. 1118 Before the Senate Committee on Banking and Currency, 83rd Cong., 1st Sess. 136 (1953) (Testimony of Harry J. Harding, President, Independent Bankers' Association of the 12th District) (emphasis added) (Ct. App. JA1951).

2. *The Compact Clause*

Under the Compact Clause, the need for an unambiguous showing of Congressional consent to save a discriminatory interstate compact is established by the language of the Constitution itself. Art. I, § 10, Cl. 3 provides that "[n]o state shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . ." Such unambiguous consent is essential because, as House Judiciary Chairman Peter W. Rodino, Jr., recently observed, unsupervised regional compacts can convert states into "rival economic coalitions" and "invite retaliation." In view of these dangers, Chairman Rodino emphasized that "[w]hile the Congress has on rare occasions authorized certain compacts in advance, it has done so only after long and thoughtful deliberation of the potential consequences" (Pet. Reply Brief App. A2).

The Board expressly found that the statutes at issue here could be considered to be part of a compact "that has never been approved by Congress" (Pet. App. A52). This conclusion is compelled by the foregoing analysis, which demonstrates that neither the language nor the legislative history of the Douglas Amendment establishes that individual states were authorized to discriminate against interstate commerce, much less that Congress intended to allow groups of states to enter into discriminatory multi-state compacts.

Speaking solely of a single host "State," and designed to preserve "the autonomy of the *separate* States" (*see supra* at 22, 25), the Douglas Amendment manifests no Congressional intent whatsoever to approve exclusionary multi-state compacts. As this Court has stated, even when Congress refers to regulation by a single State, "the language has no relation to possible joint control by two or more States under the compact clause of the Constitution." *United States* v. *Public Utilities Commission,* 345 U.S. 295, 309 n.16 (1953), quoting *Safe Harbor Water Power Corp.* v. *Federal Power Commission,* 179 F.2d 179, 187 (3d Cir. 1949).

C. The Court Of Appeals Did Not Identify Unmistakable Congressional Authorization

In concluding that the Douglas Amendment authorizes the Massachusetts and Connecticut Acts, the Court of Appeals noted certain remarks by Senator Douglas during the floor debates that referred to the ability of the states to permit the entry of out-of-state bank holding companies "only to the degree that State laws expressly permit them," and which suggested that the Douglas Amendment paralleled the McFadden Act provisions concerning the power of national banks to establish branches (Pet. App. A28, quoting 102 Cong. Rec. 6858 (1956)). However, "[r]eliance on such isolated fragments of legislative history in divining the intent of Congress" is precisely the sort of exercise in guesswork and speculation that this Court has refused to countenance. *New England Power Co.* v. *New Hampshire,* 455 U.S. 331, 342 (1982).

Sheer speculation is what is required to convert these few ambiguous comments of Senator Douglas into intentional Congressional authorization of the New England Compact's infringement of established Constitutional principles. Such snippets of conversation:

> "are too fragmentary and unspecific to show congressional intent to authorize discrimination otherwise contrary to the Commerce Clause [and the Compact Clause], especially where the Supreme Court has required such explicit and clear authorization of discrimination by the Congress because of the fundamental implications of such discrimination for the federal union" (Pet. App. A67).

Accord Chrysler Corp. v. *Brown,* 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history.").

Furthermore, the above-quoted fragments from the floor debates do not suggest that the Douglas Amendment allows states—especially states acting in concert—to discriminate among bank holding companies in any manner they choose. In referring to "them" generally (*i.e.*, to all "out-of-state

bank holding companies''), Senator Douglas' statement, if anything, supports petitioners' view that the Douglas Amendment does not authorize discrimination among out-of-state bank holding companies in a manner that violates the Constitution. And the Senator's use of the ambiguous phrase ''to the degree that state laws expressly permit them'' is best understood as referring to the number of states that ultimately would choose interstate banking by express statutory enactment, rather than the terms and conditions any future state statute might impose.

Nor do Senator Douglas' references to the McFadden Act, 12 U.S.C. § 36, support the decision below. Quite to the contrary, the McFadden Act sought to assure ''competitive equality'' by giving national banks an ability equivalent to that of state chartered banks to branch within individual states. *First National Bank* v. *Walker Bank & Trust,* 385 U.S. 252, 261 (1966). Limited as it is to state boundaries and grounded as it is in a concern for equality, this federal statute cannot be cited to support the contention that the Douglas Amendment authorizes regional compacts that interfere with interstate transactions and discriminate against bank holding companies based solely on their location.[20]

The Court of Appeals also asserted, however, in deference to the Board, that the Douglas Amendment implicitly sanctions the Massachusetts and Connecticut Acts because it purportedly ''renounces'' all federal interest in interstate banking in favor of the states.[21] This assertion con-

20. *See* Pet. App. A208-A221; *see also* Fisher & Golembe, *The Branch Banking Provisions of the McFadden Act as Amended, reprinted in* Compendium of Issues Relating to Branching by Financial Institutions, Subcommittee on Financial Institutions of the Senate Banking Committee, 94th Cong., 2d Sess. 21 (1976) ("To say that [the McFadden Act] was meant to give the states control over federal branching policy is to misread more than a century of national bank legislation and judicial history.").

21. The Court of Appeals' deference to the Board was surprising since the Board itself expressed uncertainty over this issue (Pet. App. A41), and, in the Court of Appeals, the Board declined to

(footnote continued on next page)

flicts with the Board's finding that Congress has not authorized regional banking compacts (Pet. App. A52). Moreover, it rests on the strained notion that in 1956 Congress, without even considering the possibility of discriminatory state statutes or compacts, and without explicitly addressing the issue, harbored an unexpressed intent to authorize any form of discrimination, no matter how pernicious, irrational, and contrary to constitutional standards. The Court of Appeals adduced no proof of such an intent, nor did it provide any basis to believe that, in considering the Douglas Amendment, a Congressional representative from New York, Texas or California would have realized that the bill would authorize a concerted boycott against his state.[22]

Finally, the Court of Appeals erred in its analysis of the Congressional authorization issue by concluding that "if at any time Congress should find any encroachment [on the part of the New England Compact] it could remove the encroachment by appropriate legislation." This theory would authorize any compact—no matter how pernicious—

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defend its interpretation of the statute, stating that the "legal issue of the constitutionality of the Connecticut and Massachusetts regional interstate banking statutes remains for this Court to decide" (App. Br. 19).

Moreover, the Board's resolution of the constitutional issues in this case was a particularly frail foundation for the Court of Appeals' decision because the Board utilized a standard of review that employs a nearly irrebuttable presumption of the validity of the challenged state laws. *See supra* at 9-10. Under *Whitney National Bank*, 379 U.S. 411, and *Iowa Independent Bankers*, 511 F.2d at 1293 n.4, the Board was obliged to decide these constitutional issues fairly on the merits in light of this Court's past decisions.

Stated otherwise, the "presumptions" applied by both the Board and the Court of Appeals in combination have seriously distorted the analysis of petitioners' constitutional claims. If an administrative agency utilizes a nearly irrebuttable presumption of constitutionality, and the reviewing court thereafter defers to the administrative ruling, there is almost no chance that a state law will ever be found unconstitutional in such a proceeding, no matter how inconsistent it is with the past decisions of this Court.

22. As discussed *infra* at 48-49, the Court of Appeals' "renunciation of federal interest theory" also is an inadequate basis to support the conclusion that the New England Compact is valid under the Compact Clause absent Congressional Approval.

simply because Congress could later invalidate it. That is not the law. The Compact Clause places the burden on the discriminating states to obtain Congressional approval, not on Congress to seek out and police discriminatory compacts.

In short, the opinion of the Court of Appeals offers no support for its conclusion that Congress consented, *sub silentio*, to the discriminatory New England legislation.

D. Allowing Courts Liberally To Imply Congressional Authorization Would Frustrate Congress' Policy-Making Authority

For all the reasons discussed above, respondents cannot establish by any evidence—much less "unmistakable" evidence—that the members of Congress in 1956 made a "collective decision" to allow confederations of states to partition the nation's banking system and erect discriminatory trade zones. *Wunnicke*, 104 S. Ct. at 2242-43. If Congress had intended to relinquish its authority and allow states to create such a "multiplication of preferential trade areas destructive of the very purpose" of the Constitution (*Great Atlantic & Pacific Tea Co., Inc.* v. *Cottrell*, 424 U.S. 366, 380 (1976)), it certainly would have said so in a way that no one could mistake. It did not, and indulging imaginative inferences of authorization here would open the door to unbounded searches for "implicit" Congressional intent to support other types of discriminatory legislation, to the detriment of our federal system and national economy.

Moreover, liberal inferences of unexpressed consent would allow the courts to transfer to themselves and the states policy-making authority that the Constitution has vested in Congress. The consent standards of the Commerce and Compact Clauses guarantee that before a state is subjected to discriminatory legislation by sister states, or the structure of our federal system is otherwise impaired, the national legislature will have focused on the issue, considered the wisdom of imposing discrimination, and approved the departure from constitutional standards

to serve an overriding *national* interest. Representatives of a state that would be subjected to discrimination are entitled to participate in the consideration and ultimate decision, and the national legislature must be able to make policy of nation-wide import. "A rule requiring a clear expression of approval by Congress ensures that there is, in fact, such a collective decision." *Wunnicke,* 104 S. Ct. at 2243.

If federal courts may imply Congressional approval of discriminatory multi-state arrangements from the general language of federal statutes aimed at different objectives, then the common market of co-equal states guaranteed by the Framers of the Constitution will be exposed to hazards beyond the power of Congress adequately to control, and injured states will be left with no recourse other than retaliation. This would constitute a substantial threat not only to the welfare of states subject to discrimination, but also to the citizens of all states who benefit from the vital national economy protected by those constitutional safeguards.

II. The Connecticut And Massachusetts Acts Violate The Commerce Clause

Absent Congressional consent—which does not exist here—there is no doubt that the discriminatory New England statutes violate the Commerce Clause. The Board and the Solicitor General agree with this conclusion, and the other respondents do not seriously contend otherwise.

This Court consistently has held that when state legislation is openly protectionist—when it overtly discriminates against trade originating from a particular state or states in order to further local economic interests—a *per se* rule of unconstitutionality will be applied. *See, e.g., Lewis* v. *BT Investment Managers, Inc.,* 447 U.S. 27, 36 (1980); *Philadelphia* v. *New Jersey,* 437 U.S. 617, 624 (1978). On the other hand, when legislation promotes a legitimate state objective in an even-handed manner, the Court balances the state interests advanced against the

federal interest in unencumbered interstate commerce, and requires the state to promote its valid interests with the least possible injury to interstate trade. *See, e.g., Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). As both the Board (Pet. App. A55) and the Solicitor General (Board Br. in Opp. 5) have recognized, the New England Compact and the Connecticut and Massachusetts Acts violate both the *per se* and the balancing tests.

A. The Connecticut And Massachusetts Acts Are Unconstitutional *Per Se* Because They Impose A Geographic Boycott Solely For The Purpose Of Economic Protectionism

The Connecticut and Massachusetts Acts are *per se* invalid because they are blatantly protectionist measures that intentionally interfere with the domestic free market the Commerce Clause was designed to foster. In particular, they: (1) openly and intentionally discriminate against certain bank holding companies solely because their principal places of business (or those of their parents) are located outside of New England; and (2) are designed to insulate New England companies, and especially Connecticut and Massachusetts companies, from competition by non-New England firms.

The plain language and legislative history of the Connecticut and Massachusetts Acts manifest their discriminatory, protectionist purpose and effect. Both Senator Sullivan and Representative Onorato, the principal sponsors of the Connecticut Act, urged the adoption of the regional restriction provision in order to protect Connecticut banking institutions from competition by out-of-state institutions, particularly those located in the nation's money centers, *i.e.*, New York, Illinois, Texas and California.[23] Similarly, the Massachusetts Act, according

23. *See, e.g.*, Conn. Sen. Debate (Sen. Sullivan) ("[T]he main reason for this New England position is . . . to give our banks in Connecticut time to merge and consolidate and purchase some of the New England banks around and get as large as they possibly

(footnote continued on next page)

to its principal sponsor, State Senator John Brennan, was specifically intended to exclude New York and other money center bank holding companies in order to give local companies "the space to grow" (Pet. App. A189). *See supra* at 5-6.

The geographic discrimination in both the Connecticut and Massachusetts Acts reflects the very essence of the local parochialism and protectionism prohibited by the Commerce Clause. *See Lewis*, 447 U.S. at 44; *H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 538 (1949). Indeed, even if the Connecticut and Massachusetts Acts served objectives beyond local and regional protectionism, those laws would be *per se* unconstitutional, since their effect is to discriminate against interstate commerce. *Philadelphia* v. *New Jersey*, 437 U.S. 617, 623-24 (1978).

Moreover, the New England Compact is not the handiwork of a single state, but rather is part of a more harmful arrangement by a group of states to discriminate against their sister states and form an insular banking region. This concerted conduct exacerbates the injury caused by the individual statutes and increases their burden on interstate commerce. As the Board correctly recognized, the prohibitions of the Commerce Clause "are particularly applicable to state statutes that selectively confer benefits on one or more states" and deny those same benefits to other states (Pet. App. A56). *Accord Brimmer* v. *Rebman*, 138 U.S. 78, 82 (1891) ("[A State] . . . may not . . . make discriminations against the products and industries of some of the States in favor of the products and industries of its own *or of other States*") (emphasis added); *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346, 351 (1939).

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can so we can thwart any intervention as best we can from the large institutions . . . .") (Pet. App. A159); Conn. House Debate (Rep. Onorato) ("[I]f you want to talk about protecting the integrity of our own Connecticut home banks, what this bill does is gives Connecticut the lead time that it needs to go into the regional areas where they have something in common with other members") (Pet. App. A157).

B. The Connecticut And Massachusetts Acts Cannot Be Justified As Imposing Only An Incidental Burden Necessitated By Legitimate Local Concerns

If, despite the patently discriminatory purpose and effect of the Massachusetts and Connecticut Acts, this Court were to apply the "balancing test" used to evaluate even-handed laws adopted for legitimate purposes, analysis of the regional restriction provisions of those statutes would lead to the same finding of unconstitutionality. The immutable geographic discrimination imposed by these statutes cannot be justified by any legitimate state objective.

In *Lewis,* this Court considered a Commerce Clause challenge to a Florida statute designed to prevent out-of-state banks, trust companies and bank holding companies from owning or controlling an investment advisory business in Florida. Identifying three interests Florida sought to promote through its legislation—regulating local financial practices, discouraging undue economic concentration, and maximizing local control over local financial activities —and without considering whether the statute was unconstitutional *per se,* this Court found that "the disparate treatment of out-of-state bank holding companies cannot be justified as an incidental burden necessitated by legitimate local concerns." 447 U.S. at 42. The Court reasoned:

> "Appellant has demonstrated no basis for an inference that all out-of-state bank holding companies are likely to possess the evils of monopoly power, that they are more likely to do so than their homegrown counterparts, or that they are any more inclined to engage in sharp practices than bank holding companies that are locally based. Nor is there any reason to conclude that outright prohibition of entry, rather than some intermediate form of regulation, is the only effective method of protecting against the presumed evils. . . .
>
> With regard to the asserted interest in promoting local control over financial institutions, we doubt that the interest itself is entirely clear of any tinge of local parochialism. In almost any Commerce Clause case it

would be possible for a State to argue that it has an interest in bolstering local ownership, or wealth, or control of business enterprise. Yet these arguments are at odds with the general principle that the Commerce Clause prohibits a State from using its regulatory power to protect its own citizens from outside competition." *Id.* at 43-44 (citations and footnote omitted).

As in *Lewis,* any asserted interest here in protecting against the "presumed evils" of out-of-state banking institutions cannot justify the blanket geographic distinctions made by the challenged statutes. Those laws simply differentiate between companies located in New England and those that are not, and Connecticut and Massachusetts have demonstrated absolutely no basis for inferring that all non-New England bank holding companies possess "the evils of monopoly power," or are "inclined to engage in sharp practices" or any other adverse conduct. Nor is there any reason to conclude that any such "presumed evils" that exist are not shared by New England institutions, or "that the State's interest in local control, to the extent it legitimately exists, has been significantly or evenhandedly advanced by the statutory means that have been employed." *Id.* at 44.

C. The Court Of Appeals Improperly Analyzed The Connecticut And Massachusetts Acts Under The Commerce Clause

The Court of Appeals did not discuss either the *per se* or the balancing tests; rather, it observed that "in permitting interstate acquisitions (albeit limited to New England), the Massachusetts and Connecticut statutes would appear to promote interstate commerce rather than restrict it" (Pet. App. A29). The apparent theory is that any state legislation allowing any interstate bank acquisition is, by definition, less burdensome than the total federal prohibition, and that the states therefore are free to impose whatever restrictions they might choose, no matter how irrational and discriminatory.

Neither logic nor Constitutional precedent suggests that the ability of a state to permit commerce that otherwise would be federally prohibited is in any way equivalent to authority to join together and discriminate against certain sister states. The Court of Appeals' observation overlooks the critical principle of federalism embodied in the Commerce Clause. It is one thing for Congress to restrict interstate commerce, or expressly to authorize its restriction, but it is quite another for the states, lacking any express authority and relying upon Congressional silence, to arrogate that power to themselves.[24] Any regional commerce purportedly fostered by restrictive state legislation is purchased at too high a price when that legislation constitutes blatant discrimination by a group of states against co-equal sister states that may be induced to retaliate and further obstruct the arteries of commerce. *See supra* at 26, 31.

The Court of Appeals' analysis also fails because it ignores the reality of the regionally restrictive Connecticut and Massachusetts Acts. Those statutes embody not only a decision to allow some commerce, but also a conscious joint decision to exclude other commerce. These reciprocal statutes dramatically restrict interstate commerce by boycotting the bank holding companies located in disfavored states, by inhibiting acquisitions by New England bank holding companies of non-New England banks, by realigning the nation's entire banking system, and by potentially inducing retaliation from other states. These restrictions assume special importance because they are not merely the action of a single state, but of a group of states acting in concert to boycott and impair the commerce of sister states. Thus, the Board correctly found that, absent Congressional approval, those statutes impose "a burden on

24. *See H.P. Hood & Sons, Inc.* v. *Du Mond*, 336 U.S. 525, 543 (1949) ("[i]t is, of course, a quite different thing if Congress through its agents finds . . . restrictions upon interstate commerce advance the national welfare, than if a locality is held free to impose them because it, judging its own cause, finds them in the interest of local prosperity").

interstate commerce of the type that would be found by the courts to violate the Commerce Clause" (Pet. App. A58).

D. Respondents Cannot Defend The Connecticut And Massachusetts Acts By Reference To Other Types Of State Statutes

Respondents have argued (*e.g.*, CBT Br. in Opp. 15-19) that the Connecticut and Massachusetts Acts are constitutional because other interstate banking statutes also allow only certain out-of-state bank holding companies to enter the state, although they do not make geographic distinctions. *See supra* at 4. Respondents speculate that if the Connecticut and Massachusetts Acts are unconstitutional, these other, non-regional statutes also may be called into question.

While these other state laws are not at issue here, they are plainly distinguishable from the statutes involved in this case. The other statutes cited by respondents constitute unilateral action by a single state, not joint action by a group of states to harm sister states. Moreover, in contrast to the Connecticut and Massachusetts Acts, the other states' laws do not rest on regional parochialism, do not have the purpose and effect of imposing a boycott against disfavored sister states, and are not a source of friction in the federal system.

The Board correctly rejected this argument, explaining that these other state laws impose "substantially less of a burden on commerce in the furtherance of legitimate state objectives" (Pet. App. A71). The Board recently re-emphasized this fundamental distinction in *Citicorp*, 71 Fed. Res. Bull. 101, 103 (1984), stating that:

> "[S]uch statutes do not raise the serious constitutional questions under the Commerce Clause that are posed when states discriminate against other states based upon location of the out-of-state bank holding company [and] that have arisen with respect to regional

banking compacts in which states allow only bank holding companies in selected other states to acquire banks within the host state to engage in the full range of banking services."

III. The Connecticut And Massachusetts Acts Violate The Compact Clause

Article I, § 10, Cl. 3 of the United States Constitution provides that:

> "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ."

This provision embodies one of the fundamental precepts of our federal system of government.[25] In the words of Justice White:

> "In framing the Constitution the new Republic was at pains to correct the divisive factors of the Government under the Articles; and among the most important of these were 'compacts witht the consent of Congs. as between Pena. and N. Jersey, and between Virga. & Maryd.' James Madison, 'Preface to Debates in the Convention of 1787,' 3 M. Farrand, Records of the Federal Convention of 1787, 548 (1937). A compact between two States necessarily achieved some objective unattainable, or attainable less conveniently, by separate States acting alone. Such effects were jealously guarded against, lest the 'Fedl authy [be] violated.' *Ibid.* It was the Federal Government's province to oversee conduct of a greater effect than a single State could accomplish, to protect both its own prerogative and that of the excluded States."

United States Steel Corp. v. *Multistate Tax Commission*, 434 U.S. 452, 482-83 (1978) (White, J., dissenting on other

25. *See supra* at 16-18. *See also* Tribe, *Intergovernmental Immunities In Litigation, Taxation, And Regulation: Separation Of Powers Issues In Controversies About Federalism*, 89 Harv. L. Rev. 682, 712 (1976) ("The compact clause explicitly recognizes Congress' role as chief architect of the federal system.").

grounds). *See also* M. Farrand, *The Framing of the Constitution of the United States* 7-8, 47-48, 153-54 (1913); II G. Bancroft, *History of the Formation of the Constitution* 141 (1882) (noting that a widespread fear of "schemes for a division of the thirteen states into two or more separate groups" led to the adoption of the Compact Clause). *See also* C. Warren, *The Making of the Constitution*, 23, 24, 30, 46, 79, 130, 205-06, 216-18, 257, 293-94, 548-50 (1928).

As a result of this fear of regional combinations, the Framers of the Constitution decided to confer sovereignty upon only two entities: the individual states, with regard to their own internal matters; and the United States, with regard to matters of national concern. They confined "[e]ach state . . . in its government strictly to its own duties within itself," and carefully regulated "any agreement or compact with any other state." II G. Bancroft at 141. The Compact Clause left no room, in the absence of deliberate Congressional approval, for any regional relationship or sub-national agreement among states that might invade the rights of sister states or otherwise impair the harmony of the Union. *Multistate Tax Commission*, 434 U.S. at 477-78 (1978).

A. Massachusetts, Connecticut And Rhode Island Have Formed A Compact

Any suggestion that Connecticut, Massachusetts and Rhode Island adopted their regional banking statutes "unilaterally," or that there is no compact among the states, flies in the face of the record. Within a period of less than a year, these New England states enacted reciprocal statutes imposing virtually identical geographic limitations on entry by out-of-state bank holding companies into their respective states. Indeed, it was only by coordinating their efforts that these states could ensure that regional banking would be established, that uniform barriers to entry by outside companies would be raised, and that the ultimate purpose of the Compact—to insulate New England companies from competition from non-New England firms—would be realized.

Nor were these laws enacted in a vacuum. The Board's findings confirm that the Connecticut and Massachusetts Acts were concerted action resulting from careful planning and discussions between the states:

> "[P]assage of the acts was preceded during a four-month period by a formal meeting of representatives of the New England states to discuss regional interstate banking, by the formation of a New England Committee to Study and Promote Regional Interstate Banking, by testimony of legislators at hearings on the issue before legislative committees in other New England states and by apparent review and comments on the proposed Connecticut legislation by the Massachusetts Banking Department" (Pet. App. A51).

Moreover, as the Board also noted (Pet. App. A51-A52), reciprocal legislation, such as that involved in this case, is in and of itself sufficient to constitute a compact. *Multistate Tax Commission,* 434 U.S. at 470. *See also Virginia* v. *Tennessee,* 148 U.S. 503, 517-18 (1893).[26]

B. The New England Compact Is Precisely The Kind Of Interstate Agreement That The Compact Clause Was Designed To Regulate

Unless it is approved by Congress, an interstate compact violates the Compact Clause if it (1) injures sister states or (2) otherwise encroaches upon federal authority. A compact that has either effect trenches on "the just supremacy of the United States" (Pet. App. A32) because of its "impact on our federal structure." *Multistate Tax Commission,* 434 U.S. at 471.

As the Board expressly recognized and respondents did not contest below, Congress has neither expressly nor impliedly consented to the New England Compact. The

26. *Accord* Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments,* 34 Yale L.J. 685, 735-48 (1925) (compiling a list of compacts which include a number of reciprocal statutes passed by two or more states establishing rights common to all the states involved).

absence of Congressional endorsement of the New England Compact has been effectively admitted by the proponents of regional banking compacts, who have made repeated *unsuccessful* efforts to obtain federal legislation that would sanction these arrangements. *See supra* at 7.

The New England Compact is precisely the type of compact that is proscribed by the Constitution in the absence of Congressional consent. This Court has characterized those unapproved compacts that do not violate the Compact Clause as "catalyst[s] of cohesion," which reflect efforts to harmonize interstate relations "through the voluntary and cooperative actions of individual States with a view to increasing harmony within the federalism created by the Constitution." *New York* v. *O'Neill,* 359 U.S. 1, 6 (1959).[27] Thus, the Board recognized that "[w]hile there are judicial decisions upholding interstate agreements, these agreements have not had the objective of discrimination but rather that of cooperation on a subject matter of exclusive interest to the states that are parties to these agreements" (Pet. App. A50 n.5).

This is the first case to reach this Court that squarely raises the constitutionality of a compact that (1) has not been approved by Congress, (2) poses a direct affront to the sovereignty of excluded sister states, and (3) is inconsistent with a regulatory scheme established by the federal government. The New England Compact is radically different in purpose and effect from the agreements that have been approved by this Court in that, instead of promoting cooperation, the discriminatory New England Compact benefits New England states at the

27. Examples of such compacts for which Congressional consent is not required include the Uniform Law to Secure the Attendance of Witnesses from Within or Without a State in Criminal Proceedings, referred to in *New York* v. *O'Neill,* 359 U.S. at 3, 11 (the Constitution does not preclude states from adopting "reciprocal, voluntary legislation . . . to accomplish fruitful and unprohibited ends"); the Multistate Tax Commission at issue in *Multistate Tax Commission,* 434 U.S. 452; and the Interstate Compact on Mental Health and the Colorado River Compact of 1921 (as described in F. Zimmermann & M. Wendell, *The Law and Use of Interstate Compacts* (1976)).

expense of all other states and affects a subject of significant national concern by interfering with and disrupting federal regulation of interstate banking. *See* Letter from Peter W. Rodino, Jr. to Thomas P. O'Neill, Jr. (legislation authorizing regional banking "would appear to authorize a commercial compact open only to a 'select' group of States in subject matter areas specifically regulated by the Federal Government") (Pet. Reply Brief App. A2).

1. The New England Compact Benefits The Compacting States At The Expense Of Excluded States And Deranges Relations Among The States Of The Union

This Court consistently has recognized that the Compact Clause was designed to prevent groups of states from increasing their power at the expense of sister states and thereby undermining the Union. For example, in *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 726 (1838), the Court stated that "in giving to congress the power of dissenting to such compacts," the Constitution intended "to guard against the derangement of [a state's] federal relations with the other states of the Union." And, in *Florida* v. *Georgia*, 58 U.S. (17 How.) 478, 494 (1855), the Court observed that:

> "By the 10th section of the 1st article of the constitution, no State can enter into any agreement or compact with another State, without the consent of congress. . . . *This provision is obviously intended to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States, which might affect injuriously the interests of the others.* And the right and the duty to protect these interests is vested in the general government" (emphasis supplied).

The same rationale was employed by this Court in the recent case of *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452 (1978). While the majority and

dissenting opinions disagreed about the proper application of Compact Clause principles to the facts of that particular case, they agreed that a multistate compact would require Congressional approval if it disturbed relations among sister states. Accordingly, the majority carefully considered the question whether the multistate tax compact would "redound to the benefit of any particular group of States or to the harm of others." *Id.* at 477.

Justice White's dissenting opinion in the *Multistate Tax Commission* case also emphasized that a compact that impairs the interests of sister states is forbidden unless explicitly approved by Congress. Noting that the majority "appears to recognize that allegations of harmful impact on other States is a cognizable challenge to a compact," *id.* at 495, Justice White stressed that:

> "There is no want of authority for the conclusion that encroachments upon non-compact States are as seriously to be guarded against as encroachments upon the federal authority, nor is that surprising in view of the Federal Government's preeminent purpose to protect the rights of one State against another. If the effect of a compact were to put non-compact States at a serious disadvantage, the federal interest would thereby be affected as well." *Id.* at 494-95.

Justice White also emphasized the essential protective role of Congress in reviewing multi-state compacts of concern to excluded states:[28]

> "As the constitutional arbiter of political differences between States, the Congress is the proper body to evaluate the extent of harm being imposed on non-Compact States, and to impose ameliorative restrictions as might be necessary." *Id.* at 496.

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28. *See also Cuyler* v. *Adams,* 449 U.S. 433, 451 (1981) (Rehnquist, J., dissenting on other grounds) (noting that to fall within the purview of the Compact Clause, a compact must encroach on federal supremacy or "elevate member States at the expense of nonmembers"); F. Zimmermann & M. Wendell, *The Law and Use of Interstate Compacts* 23 (1976) (compacts that have a discriminatory effect upon non-party states "could be described as affecting the political balance of the federal system").

By its very nature, the New England Compact is intended to, and does, benefit member states to the detriment of excluded states. Indeed, the exclusion of non-New England states, and the aggrandizement of the member states, is the very *raison d'etre* of the New England Compact. The legislative history of the Connecticut and Massachusetts Acts confirms the protectionist, exclusionary nature of these statutes, and the Compact of which they are part. *See supra* at 5-6, 32-33.

The unconstitutionality of the New England Compact is underscored by this Court's analysis of the fundamentally different type of interstate agreement upheld in *Multistate Tax Commission*. Three critical points distinguish the *Multistate Tax Commission* compact from the one involved in this case.

First, membership in the Multistate Tax Commission was open to all states on a uniform basis. The New England Compact is open only to six states, and excluded states have no means available to protect their sovereign interests. *Second,* the Court in *Multistate Tax Commission* found that the risk of any potential harmful effects was "independent of the Compact," since the individual states could have imposed identical effects on the appellants there without entering into an agreement. 434 U.S. at 478. In contrast, the competitive advantages to be secured by an exclusionary banking region can only be realized by means of an arrangement among the states located within the region. *Third,* the *Multistate Tax Commission* compact involved nothing that would "redound to the benefit of any particular group of States or to the harm of others." *Id.* at 477. Markedly different is the New England Compact, which substantially benefits the New England states at the expense of all others. *See also New York* v. *O'Neill,* 359 U.S. at 6 (upholding a compact on the grounds that the arrangement was "voluntary and cooperative" and, most importantly, that it "increas[ed] harmony within the federalism created by the Constitution").

Thus, standing by themselves, the adverse effects of the New England Compact on excluded sister states are enough to invalidate the Compact.

2. The New England Compact Encroaches Upon The Exercise Of Federal Authority

The fact that the New England Compact has the purpose and effect of increasing the power of member states at the expense of all other states is itself a serious encroachment upon the supremacy of the Union. Our federal system owes its very existence to the Founding Fathers' condemnation of the parochial alliances and partial confederacies among states that developed under the Articles of Confederation. *See supra* at 16-17. As this Court stressed in *Coyle* v. *Oklahoma,* 221 U.S. 559, 580 (1911), "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized."

The New England Compact encroaches on federal authority in other ways as well. There can be no dispute that the New England Compact affects interstate banking, an area that, because of its critical national importance, is subject to federal regulatory authority. In this Court's words, the federal government retains a "broad and comprehensive national authority over the subjects of revenue, finance, and currency." *Norman* v. *Baltimore & Ohio Railroad Co.,* 294 U.S. 240, 303 (1935). Indeed, the vital federal interest in the interstate attributes of banking activities is apparent from the:

> "impressive array of federal statutes regulating not only the provision of banking services but also the formation of banking organizations, the rendering of investment advice, and the conduct of national investment markets."

Lewis v. *BT Investment Managers, Inc.,* 447 U.S. 27, 38 (1980).

In the New England Compact, Connecticut, Massachusetts and Rhode Island have far exceeded the scope of any action permitted them by the Douglas Amendment or any other federal legislation. They have aggregated powers granted to individual states over internal banking structure, and have thereby "project[ed] a new presence

onto the federal system" established by Congress to regulate interstate banking. *Multistate Tax Commission*, 434 U.S. at 469 n.21. This attempt to control interstate banking is clearly improper, for the states cannot through a compact "exercise any powers they could not exercise in its absence." *Id.* at 473.

The New England Compact also poses a substantial threat to federal policy articulated in 12 U.S.C. § 1823(f), part of the recently enacted Garn-St Germain Depository Institutions Act of 1982. That statute contemplates that the Federal Deposit Insurance Corporation ("FDIC") will arrange acquisitions of failing or failed banking institutions by out-of-state bank holding companies. The Connecticut Act, however, prohibits Connecticut banks and bank holding companies from acquiring non-New England banks (Pet. App. A99), and thereby prevents the FDIC from looking towards Connecticut banking institutions to save failing or failed non-New England banks. The Connecticut Act also inhibits the ability of the FDIC to solicit bids for failing or failed non-New England banks from bank holding companies located in other New England states (*e.g.*, Massachusetts) that control or desire to control a Connecticut bank. This is because such a company would be required to divest itself of its Connecticut banks, or would be prohibited from making such an acquisition, if it acquired a non-New England bank (Pet. App. A99).

The Connecticut Act and the New England Compact of which it is part thus conflict with the paramount federal policy encouraging the interstate acquisition of failing or failed banks, and accordingly infringe the Compact Clause as well as the Supremacy Clause (Art. VI, Cl. 2) of the Constitution. Moreover, as this Court recognized in *Multistate Tax Commission*, the pertinent inquiry under the Compact Clause is one of "potential, rather than actual impact on federal supremacy." 434 U.S. at 472. The forbidden "potential impact" exists here because the practical effect of the challenged legislation is "to discourage conduct that federal action seeks to en-

courage." L. Tribe, *American Constitutional Law* § 6-24, at 378 (1978). *See, e.g., Nash* v. *Florida Industrial Commission*, 389 U.S. 235, 239 (1967).

3. The "Renunciation Of Federal Interest" Theory Does Not Save The New England Compact

Despite the adverse impact of the New England Compact on excluded states and federal authority, the Court of Appeals endorsed the Board's unsupported view that the compact is constitutional because, in enacting the Douglas Amendment, Congress somehow renounced all federal interest in interstate banking (Pet. App. A29). This assertion ignores the purpose of the Compact Clause—to ensure that states do not join together to aggrandize themselves and injure their sister states. Even total renunciation by the federal government of its interest in the regulation of interstate banking could not justify an effort by states to combine against the welfare of other co-equal states. Congressional approval of such a divisive compact is necessary not only to protect the interests of the federal government itself, but also to ensure that an injured state has a forum in which to be heard before other states impair its local economy.

Moreover, the view that the Douglas Amendment represents a "renunciation of federal interest" in the area of interstate banking conflicts with both the language and history of that statute—which supports no such conclusion, *see supra* at 20-25, and the Board's finding that Congress has not consented to exclusionary banking compacts (Pet. App. A52). It is simply untenable to argue that, while Congress has never approved discriminatory regional banking compacts, the ability of individual states to lift the federal ban on interstate banking constitutes "advance" Congressional consent for states to form any discriminatory banking combination they might choose. Such creation of consent by judicial implication would eviscerate the Compact Clause and strip Congress of its essential policy-making function.

Beyond this, the "renunciation of federal interest" theory ignores the procedure for congressional review and

appraisal of proposed compacts. As Chairman Rodino has explained:

> "Typically, compacts are negotiated and agreed to by the States and then submitted to Congress for careful review and approval. . . . While the Congress has on rare occasions authorized certain compacts in advance, it has done so only after long and thoughtful deliberation of the potential consequences" (Pet. Reply Brief App. A2).

Finally, far from abandoning the subject of interstate bank holding company expansion to the unlimited discretion of the states, the Douglas Amendment affirmatively articulates federal policy in this area—that there shall be no interstate bank acquisitions except as each state, acting individually, may through the enactment of a valid statute make exceptions with regard to acquisitions of banks within its own borders. Recently amended in 1982 to comport with federal policy on the acquisition of failing banks (*see supra* at 46-47), the Douglas Amendment demonstrates that the federal government has a paramount interest in regulating the interstate expansion of bank holding companies, an interest that has been impaired by the effort of New England states to create a regionally restrictive interstate banking system.

Thus, the Second Circuit was plainly wrong in holding that in 1956, without a single word to show its intent, Congress totally abandoned a critical field of interstate commerce to discriminatory balkanization by regional confederations of states. Indeed, the error in the Court of Appeals' "renunciation" theory is revealed beyond any doubt by the fact that this case involves the review of orders of a federal agency entrusted by Congress with approving bank acquisitions pursuant to specific criteria prescribed by Congress. 12 U.S.C. 1842(c).

In sum, because the New England Compact lacks Congressional approval, aggrandizes certain states at the expense of others, and substantially interferes with federal authority over interstate banking, that Compact, and

the Connecticut and Massachusetts Acts which are part of the Compact, violate the Compact Clause.

* * *

We end this brief on the note sounded at the very beginning. Potentially destructive of fundamental values embedded in the Constitution, regionally discriminatory banking compacts are too important to escape Congressional review and approval. If proponents of these measures have economic arguments to advance in their favor, Congress should be the arbiter of their merits. Since Congress repeatedly has failed to approve such discriminatory interstate arrangements, the purpose of the Commerce and Compact Clauses would be subverted by judicial "implication" of consent from existing laws that say not a word about that subject. This Court should reaffirm the primacy of Congress' policy-making function by reversing the decision of the Court of Appeals and permitting the debate to proceed before the national legislature—the place where the Framers intended it to occur.

Conclusion

For the reasons set forth above, petitioner Citicorp respectfully requests that the judgment of the Court of Appeals be reversed and that the Connecticut and Massachusetts Acts be declared unconstitutional.

Respectfully submitted,

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